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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 610

Norfolk and Western Railway Company,
Appellant,

v.

State of North Carolina, On Relation of A. J. Maxwell, Commissioner of Revenue,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

The motion of the Appellee to dismiss the appeal for lack of jurisdiction is based upon the assertion that "the facts found by the trial court were supported by evidence" and that the Appellant "cannot complain that the facts found by the trial court, relating to the

net income of the defendant, were not supported by evidence."

The Appellant's statement of jurisdiction on appeal discloses that the State Courts ignored or overruled the relevant admitted fact findings of the Referee. In such a case this Court can not protect duly asserted Federal rights without considering the fact findings and determining upon its own independent judgment the essential facts.

In CROWELL v. BENSON, 285 U. S., at page 60, this Court said:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts'."

Respectfully submitted,

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Counsel for Appellant.

DECEMBER 10, 1935.